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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

MAY 26 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Implementation of the
Telecommunications Act of 1996;

Telecommunications Carriers' Use
of Customer Proprietary Network
Information and Other Customer
Information;

Implementation of the Non-Accounting
Safeguards of Sections 271 and 272 of
the Communications Act of 1934, as
Amended

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) CC Docket No. 96-115
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) CC Docket No. 96-149
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PETITION FOR RECONSIDERATION AND CLARIFICATION
AND, IN THE ALTERNATIVE, FORBEARANCE

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SUMMARY

CommNet Cellular Inc. (CommNet) requests the Commission to reconsider and/or clarify several of its customer proprietary network information (CPNI) rules which were adopted in the Second Report and Order and Further Notice of Proposed Rulemaking, FCC 98-27, released Feb. 26, 1998 [hereinafter Second R&O], in the captioned docket, or in the alternative, to forbear from the corresponding provisions of Section 222 of the Communications Act of 1934, as amended (the Act). In particular, CommNet requests the Commission to:

- ◆ Reconsider the application of the CPNI restrictions to CMRS CPE (and related accessories). As an alternative to reconsideration, CommNet requests the Commission to forbear from the corresponding CPNI provisions of Section 222 of the Act, as appropriate.
- ◆ Modify its rules to clarify how the total service approach applies to CMRS providers.

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PETITION FOR RECONSIDERATION AND CLARIFICATION
AND, IN THE ALTERNATIVE, FORBEARANCE

CommNet Cellular Inc. (CommNet), by its attorneys and pursuant to Section 1.429 of the Commission's Rules and Section 10 of the Communications Act of 1934, as amended (the Act), respectfully requests the Commission to reconsider and/or clarify several of its customer proprietary network information (CPNI) rules which were adopted in the Second Report and Order and Further Notice of Proposed Rulemaking, FCC 98-27, released Feb. 26, 1998 [hereinafter Second R&O], in the captioned docket, or in the alternative, to forbear from the corresponding provisions of Section 222 of the Act.

In particular, CommNet requests the Commission to reconsider the application of the CPNI restrictions to CMRS CPE and accessories. In the alternative, and if necessary, CommNet

requests the Commission to forbear from the corresponding CPNI provisions of Section 222 of the Act.

In addition, CommNet requests the Commission to modify its rules to clarify how the total service approach applies to CMRS providers. These requests are discussed in turn below.

I. The Commission Should Reconsider the Application of the CPNI Restrictions to the Marketing of CMRS CPE and Accessories

CommNet requests the Commission to reconsider the application of the CPNI restrictions to marketing and provision of CMRS CPE and accessories such as cigarette lighter power adapters and batteries. In the alternative, CommNet requests the Commission to forbear from Section 222 of the Act to the extent necessary to permit CMRS providers to use CMRS CPNI to market CPE and related accessories. These requests are discussed in turn below.

A. The Commission Should Not Apply the CPNI Restrictions to CMRS CPE and Accessories

The application of the CPNI restrictions to CPE (and related accessories) is inconsistent with the Commission's decision to exempt inside wiring services from the CPNI restrictions. The Commission based its decision concerning inside wiring on the fact that: (a) inside wiring is part of the transmission path for local exchange service; and (b) inside wiring is "necessary to" and "used in" the provision of local exchange service. Second R&Q para. 79. In accordance with Section 222(c)(1) of the Act,

the Commission determined that the CPNI restrictions do not apply to inside wiring. Id. para. 78.

The same reasoning applies to CMRS CPE and accessories. Without CMRS CPE communicating with base stations, signals may be transmitted from the base station but cannot be received by the subscriber. Once the CPE is activated, signals can be received by the subscriber. Thus, CMRS CPE is necessary to complete the transmission of wireless communications. Also, CMRS CPE can be used only on a specific frequency and must be initialized to operate properly on the wireless carrier's particular system. The service and the CPE go hand-in-hand. The CPE is "necessary to" and "used in" a CMRS provider's provision of telecommunications service. Similarly, accessories that provide power to CMRS CPE (such as cigarette lighter power adapters and batteries) are necessary to the proper functioning of the CMRS CPE. Thus, in accordance with Section 222(c)(1) of the Act, the CPNI restrictions should not apply to CMRS CPE and accessories, just as they do not apply to inside wiring.¹

¹In deciding to prohibit carriers from using CPNI to provide or market CPE, the Commission cited two court decisions concerning wireline CPE. NARUC v. FCC, 880 F.2d 422, 431 (D.C. Cir. 1989); Computer Communications Industry v. FCC, 693 F.2d 198 (D.C. Cir. 1982). Neither decision considered CMRS CPE. In particular, neither decision focused on the fact that CMRS CPE must be programmed and adapted for use on specific wireless systems. Thus, these two court decisions are inapplicable here.

B. In the Alternative, the Commission Should Forbear from Applying the CPNI Restrictions to CMRS CPE and Accessories

If the Commission nevertheless were to determine that CMRS CPE and the corresponding accessories are subject to the CPNI restrictions in Section 222 of the Act, CommNet requests the Commission to forbear from applying the CPNI restrictions to CMRS CPE and the corresponding accessories. The three factors to be considered in granting forbearance are whether: (a) enforcement of the provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (b) enforcement of the provision is not necessary for the protection of consumers; and (c) forbearance is consistent with the public interest. 47 U.S.C. § 160. These three factors are satisfied here, as demonstrated below.

1. The CPNI Restrictions Are Not Necessary to Ensure Reasonable and Nondiscriminatory Rates for CMRS

First, the Commission, long ago, determined that CMRS CPE need not be regulated, and it did so at a time when wireless carriers, such as CommNet, could use CMRS CPNI to market CPE. See Bundling of Cellular Customer Premises Equipment and Cellular Service (Report and Order), 7 FCC Rcd. 4028 paras. 2-3 (1992) (discussing history of CPE deregulation and noting that cellular

CPE is not regulated). Thus, restrictions on the use of CPNI for the provision or marketing of CPE are not required to ensure that the rates for wireless services are reasonable and nondiscriminatory. And, in any event, CMRS providers remain subject to the reasonableness and nondiscrimination requirements of Sections 201 and 202 of the Act. Cf. Hyperion Telecommunications, Inc. (Memorandum Opinion and Order and Notice of Proposed Rulemaking), 12 FCC Rcd. 8596 para. 25 (1997) [hereinafter Hyperion Order] (in deciding whether the detariffing of interstate access services provided by non-ILECs meets the first criterion for forbearance, the FCC concluded that it could address any issues of unreasonableness or discrimination pursuant to Section 208 of the Act); Federal Communications Bar Association's Petition for Forbearance (Memorandum Opinion and Order), 13 FCC Rcd. 6293 para. 12 n.38 (1998) [hereinafter FCBA Order] (stating that Section 208 complaint proceedings can be used to deal with issues of unreasonable or discriminatory charges and practices). Thus, the first factor to be considered in granting forbearance is satisfied here.

2. **The CPNI Restrictions Are Not Necessary to Protect Subscribers**

Second, as the Commission determined that subscribers expect that CPNI will be used in the provision of inside wiring services, it follows that subscribers expect that CPNI will be used in the provision of CMRS CPE. Second R&O para. 80.

Cellular and paging subscribers usually purchase the service and the equipment together. Subscriber approval for carriers to use CMRS CPNI can be inferred because the subscriber knows that its carrier has access to that information. See id. para. 24. A decision to permit CMRS providers to use their CPNI to market CPE also is consistent with the Commission's adoption of the total service approach because the carrier's permitted use of CPNI would reflect the entire relationship between the subscriber and the carrier. Cf. id. para. 30. By comparison, a decision to retain the prohibition on the use of CPNI for providing or marketing CPE would be confusing and inconvenient for subscribers, just as the Commission determined that CPNI distinctions based on corporate structures would be confusing and inconvenient for subscribers. Id. para. 52. Subscribers expect to obtain one-stop shopping for services and CPE from CMRS providers. If the restrictions on marketing CPE were left in place, it is the subscribers that would ultimately suffer because they would not receive the advantages associated with the information sharing that otherwise would be available. Id.

Even if the subscriber did not purchase their CPE from the CMRS provider, the provision and marketing of CPE and accessories would be for the benefit and convenience of the subscriber, just as the Commission determined that permitting carriers to market related offerings under the total service approach would be for the benefit and convenience of the subscriber. Id. para. 35. The CPE and accessories may not have been available when the

subscriber purchased its CPE, the subscriber may not have known that they were available, or the subscriber may not have been ready to make such a purchase. Subscribers would expect their CMRS providers to keep them abreast of changes in CPE and accessories.

Furthermore, the provision and marketing of CMRS CPE and accessories will not result in the targeting of new CMRS subscribers. Rather, it will assist carriers in better servicing their existing subscribers, just as the Commission determined that the total service approach would assist carriers in better servicing their subscribers. See id. para. 59. Without the use of CPNI, carriers may end up mis-marketing CPE and CPE accessories to subscribers that have no need for the products being marketed. For example, a paging subscriber who uses text messaging would not want to purchase a pager that has only a numeric display. Or a cellular subscriber who has the least expensive service plan probably would not be interested in purchasing accessories to mount their phone in their car for hands-free operation. Thus, by using CPNI, carriers can tailor their marketing to subscribers that fit the product being marketed and they can avoid marketing inappropriate CPE to their subscribers, thereby limiting unnecessary contacts with subscribers.

In sum, permitting the use of CMRS CPNI in marketing and providing CPE and related accessories would not affect subscribers' privacy interests. To the contrary, subscribers

would benefit from obtaining information about available CPE and accessories that fit their service plans. Thus, the second factor to be considered in granting forbearance is satisfied here.

3. Permitting CMRS Providers to Use CPNI to Market and Provide CMRS CPE Is in the Public Interest

Third, the public interest supports forbearance. Prior to the 1996 Act, the Commission did not restrict the use of CPNI by wireless carriers, such as CommNet, to market CPE. Thus, permitting CommNet and other CMRS providers to use CPNI to market CPE will not increase any existing competitive advantage, just as the Commission determined that permitting local exchange carriers to use CPNI to market inside wiring services will not increase any existing competitive advantage. Second R&O para. 80.

Furthermore, by permitting CMRS providers to use CPNI to market CPE and the associated accessories, carriers will realize cost savings by being able to tailor their marketing to customers for whom the CPE would be appropriate. Indeed, such efficiencies have been cited by the Commission as the basis for granting forbearance in other situations. E.g., Hyperion Order para. 27 (considering costs of compliance); FCBA Order para. 20 (stating that forbearance would eliminate unnecessary expenditures of carrier resources); Bell Operating Companies Petitions for Forbearance (Memorandum Opinion and Order), CC Docket No. 96-149, DA 98-220, para. 46, released Feb. 6, 1998 (forbearance would

produce substantial cost savings). In addition, the efficiencies created by forbearance will enhance competition among CMRS providers. 47 U.S.C. § 160(b) (requiring Commission to consider the extent to which forbearance will enhance competition among telecommunications service providers); see FCBA Order para. 16 (stating that efficiencies gained from forbearance will increase wireless carriers' ability to compete).

For these reasons, forbearance would be in the public interest. Thus, the third factor to be considered in granting forbearance is satisfied here.

In sum, forbearance from the CPNI restrictions is warranted because: (a) there is no danger of unreasonable or discriminatory rates for CMRS; (b) subscribers expect their CMRS providers to have CPNI and to provide them with information about appropriate CPE and accessories; and (c) the efficient marketing of CPE and related accessories will reduce costs and enhance competition, in the public interest.

4. Suggested Change to Section 64.2005(b)(1)

To codify this forbearance, Section 64.2005(b)(1) could be amended by adding the following text at the end.

Notwithstanding the foregoing restrictions, a telecommunications carrier may use, disclose or permit access to CPNI derived from its provision of CMRS, without customer approval, for the provision of CPE and related accessories (including, but not limited to, cigarette lighter power adaptors and batteries) to be used with CMRS CPE.

In sum, CommNet requests the Commission to exempt CMRS CPE and accessories from the CPNI restrictions, just as the Commission exempted inside wiring from the CPNI restrictions. But if the Commission were to determine that CPNI restrictions of Section 222 of the Act apply to CMRS CPE and related accessories, CommNet requests the Commission to forbear from applying these restrictions to the use of CPNI to market and provide CPE and related accessories.

II. The Commission Should Amend Its Rules to State that Paging Carriers May Use the CPNI of Paging Subscribers for the Provision and Marketing of Cellular Service and Vice Versa

The Second R&O adopts a "total service approach" which is meant to permit a CMRS provider to use its CMRS subscriber's CPNI to market any of the CMRS provider's other CMRS services. For example, the total service approach would permit a cellular carrier to use cellular CPNI to market paging service, and vice versa. In general, the CPNI of a CMRS subscriber may be used to provide or market other CMRS services offered by the same CMRS provider, or its affiliates. See Second R&O n.149 ("CMRS should be viewed in its entirety.") But the total service approach is not specifically explained in the rules, and is omitted from Section 64.2007(a). CommNet therefore requests the Commission to modify its rules to clarify its intent to implement the "total service approach" as it applies to CMRS. Two suggested rule revisions are given below.

First, Section 64.2007(a) currently refers to the marketing of a "service," not a category of services. Thus, Section 64.2007(a) should be modified to state:

A telecommunications carrier must obtain customer approval to use, disclose, or permit access to CPNI to market to a customer service that is not among the categories of service (i.e., local, interexchange, and CMRS) which the customer already subscribes to from that carrier.

Second, Section 64.2007(d) refers to the "total service relationship," but that term is not defined in the rules. A definition of "total service relationship" should be added as new Section 64.2003(i) as follows:

Total service relationship refers to the categories of service to which a customer subscribes from a particular carrier and its affiliates. There are only three categories of service to be considered in determining the total service relationship: local exchange service, interexchange service, and CMRS. The total service relationship consists of zero, one, two or three of these categories of service.

In sum, CommNet supports the total service approach as it provides the opportunity to use a CMRS subscriber's CPNI to market other CMRS services. CommNet requests the Commission to state that CMRS providers may use CPNI in this way, and to modify its rules to clarify the use of the total service approach for CMRS providers.

CONCLUSION

For the foregoing reasons, CommNet respectfully requests the Commission to:

- ◆ Reconsider the application of the CPNI restrictions to CMRS CPE (and related accessories). As an alternative to reconsideration, CommNet requests the Commission to forbear from the corresponding CPNI provisions of Section 222 of the Act, as appropriate.
- ◆ Modify its rules to clarify how the total service approach applies to CMRS providers.

Respectfully submitted,

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